

United States District Court  
District of Massachusetts

MARCUS PERRY,  
Petitioner,

**v.**

PETER A. PEPE, JR.,  
Respondent.

Civil No.  
11-10279-NMG

# MEMORANDUM & ORDER

GORTON, J.

On February 9, 2012, this Court dismissed the habeas petition of Marcus Perry ("Perry"). Perry appealed that decision to the United States Court of Appeals for the First Circuit. On April 20, 2012, the First Circuit requested the Court to issue or deny a certificate of appealability consistent with Rule 11(a) of the Rules Governing Section 2255 Proceedings.

Under 28 U.S.C. § 2253(c), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make a "substantial showing," a petitioner must demonstrate that

reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

In his habeas petition, Perry challenged his conviction on the ground that he received ineffective assistance of counsel at trial. As explained in the Report and Recommendation accepted and adopted by this Court, his petition was a "mixed" petition insofar as two claims contained therein were unexhausted. Instead of dismissing the petition outright, the Court granted leave to Perry to file within thirty (30) days a withdrawal of his unexhausted claims but warned that failure to do so would result in dismissal of the petition. When Perry failed to comply with that order, his petition was dismissed.

Because reasonable jurists could not debate that Perry's petition was properly dismissed as a mixed petition, his request for a Certificate of Appealability is denied.

**ORDER**

In accordance with the foregoing, a Certificate of Appealability is **DENIED**.

**So ordered.**

  
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Nathaniel M. Gorton  
United States District Judge

Dated April 30, 2012